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Supreme Court of the United States

October Term, 1951

No. 622

BEN PRESTON, *Petitioner*,

v.

CONTINENTAL OIL COMPANY, INC., *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The petitioner, and the appellant below, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above cause on December 3, 1951 (R. 31).

OPINIONS BELOW

The District Court of the United States for the District of Kansas did not render an opinion in this cause but entered an order sustaining defendant's Motion for Summary Judgment, and the United States Circuit Court

of Appeals, Tenth Circuit, has entered a judgment in this cause without written opinion.

JURISDICTION

The judgment of the United States Court of Appeals was entered on December 3, 1951. The jurisdiction of this Court is invoked under Title 28, U. S. C. A. Sec. 1254.

QUESTION PRESENTED

Has the Circuit Court erroneously applied the doctrine of res judicata in ruling that petitioner's complaint is barred by prior judgments which were founded solely upon reasons of limitations and laches?

STATEMENT OF THE MATTER INVOLVED

On June 25, 1921, the Focks Drilling and Manufacturing Corporation acquired from Robert Bond, the fee owner of the Northeast Quarter (NE/4) of Section 26, 14 South, 13 West, Russell County, Kansas, an oil and gas lease, exhibit "A" to the complaint (R. 8, 9, 10, 11, 12), which gave the lessee the right to explore for oil thereon for a period of five (5) years from that date and as long thereafter as oil and gas should be produced therefrom. This lease was placed in escrow in the Bunkerhill State Bank of Bunkerhill, Kansas, and was to be delivered to the lessee when said lessee had spudded in a test well on a block of land decribed in the escrow agreement. This agreement was recorded in the Office of the Register of Deeds of Russell County, Kansas, on December 17, 1923 (R. 2).

On September 21, 1922, the landowner, Robert Bond, executed a written agreement extending to September 21,

1924, the time within which the lessee must spud in the test well referred to above. A photostat of this extension agreement is attached to the complaint, Exhibit "B" (R. 12, 13).

On March 4, 1924, Focks Drilling and Manufacturing Company assigned its right, title and interest in the escrow agreement and lease to the petitioner, Ben Preston, and thereafter, within the time set forth in the extension, Preston commenced the well, drilled to a depth of 555 feet and made demand upon the escrow holder for delivery of the lease. This demand was refused (R. 4). The above assignment was recorded on July 23, 1926, with the Register of Deeds, Russell County, Kansas (R. 4).

The Bunkerhill State Bank then acquired the mineral rights under said property from the landowner, Robert Bond and his wife, on February 12, 1926, by an instrument recorded on February 13, 1926, in the office of the Register of Deeds of Russell County, Kansas (R. 5).

Subsequently, the bank, having acquired the fee interest in the land, executed and delivered an oil and gas lease thereon to J. E. Missimer (R. 5), which lease was assigned to the Continental Oil Company, the respondent herein, on April 9, 1934 (R. 5).

From the time in 1924 when the Bunkerhill State Bank refused to deliver the lease in accordance with the escrow agreement until the present, the plaintiff has been prevented from completing the oil well either by continuous litigation involving all or some part of the acreage or by the cloud on plaintiff's title created by defendant's lease dated April 6, 1934 (R. 7).

Continental Oil Company took its assignment of the lease upon this land with full record and actual knowledge of the claim of this petitioner to the minerals thereunder (R. 6). Furthermore, Continental Oil Company

made no effort to take possession of the oil and gas minerals under the property and did not move on the same for the purpose of drilling a well until February 21, 1939 (R. 6).

Statement Concerning Former Cases Pertinent to This Appeal

On December 30, 1938, the petitioner filed an action in the United States District Court, District of Kansas, docketed as Civil No. 4296, and styled *Ben Preston, Plaintiff, v. Kaw Pipe Line Company, et al.,* (R. 26). The Continental Oil Company, among others, was a party defendant in this suit (R. 26).

The prayer of the complaint was that the plaintiff be decreed to be the equitable owner of the oil and gas rights under all of the original oil and gas leases on all the real estate covered thereby; that the defendant owner be required to execute new leases to the plaintiff; that the defendants now holding leases on the land be decreed to be trustees for the plaintiff; and that the defendants who have produced oil or gas from any of the premises be required to account to the plaintiff for the same.

The defendant oil companies filed an alternative motion to this complaint asking that the Court dismiss the action for the reason that the complaint failed to state a cause of action, and if overruled, that plaintiff make his petition more definite and certain. The motion to dismiss was granted on April 9, 1939, after plaintiff had requested leave to amend and an appeal was then taken to the Circuit Court. The case was at that time sent back to the District Court on the basis that no final order had been entered in the cause.

With the case back in the District Court, the plaintiff again moved for leave to file an amended complaint, which mo-

tion was denied, and a judgment entered for defendants on May 13, 1940. In dismissing the complaint, the order of the District Court read: "* * * plaintiff's cause of action is barred by laches and the Statute of Limitations at the time the complaint in the case was filed irrespective of the exact theory of the complaint."

From this judgment an appeal was taken to the United States Circuit Court of Appeals, Tenth Circuit, where the judgment was affirmed on June 28, 1940 (113 F. 2d 311). A petition for rehearing was denied on August 9, 1940, and plaintiff thereafter filed in the Supreme Court of the United States a petition for writ of certiorari to review the decision and judgment of the Circuit Court of Appeals, which petition was denied on the 16th day of December, 1940 (311 U. S. 712; 85 L. Ed. 463).

Thereafter, on May 16, 1941, the petitioner herein brought suit in the District Court of Russell County, Kansas, which suit was removed on the petition of certain defendants therein to the District Court of the United States for the District of Kansas, First Division, where it was docketed as Civil No. 4593, and styled Ben Preston, Plaintiff, vs. The Bunkerhill State Bank of Bunkerhill, Kansas, et al., Defendants (R. 26). The Continental Oil Company was a party defendant in this suit (R. 26).

This complaint prayed that the defendant landowners be compelled to specifically perform the escrow agreement and deliver the leases, or in the alternative, that they be compelled to execute new leases and escrow them under the terms of the escrow agreement; that the defendant lessees under the new leases be adjudged to be trustees for petitioner and, as such, required to account for the oil taken by them under their respective leases; and that the Kaw Pipe Line Company, the transporting company, be required to account for the oil taken by it.

The removing defendants filed motions for summary judgment on the ground that the cause of action set forth in the complaint had been adjudicated between the parties in the former suit. These motions were granted and an order was entered on August 2, 1941, which read in part as follows: "* * * and that the plaintiff's petition and the above-entitled cause be, and the same is hereby dismissed on the merits * * *".

An appeal was perfected to the United States Circuit Court of Appeals, Tenth Circuit, and on May 5, 1942, the judgment of the lower court was affirmed (128 F. 2d 162). Plaintiff's application for rehearing was denied on June 22, 1942, and a petition for certiorari filed in the Supreme Court of the United States, seeking to review the decision and judgment of the Circuit Court of Appeals was denied on the 26th day of October, 1942 (317 U. S. 674; 87 L. Ed, 541).

In affirming the judgment of the District Court, the Circuit Court of Appeals stated in its opinion that the Court's action in the initial law suit "* * * constituted a final adjudication of appellant's rights and is an effective and final bar to any further suit." (128 F. 2d 162, 165)

Statement Concerning Present Action

On the 1st day of March, 1951, the petitioner field a Complaint for Declaratory Judgment in the United States District Court for the District of Kansas, First Division, naming the Continental Oil Company a party defendant and asking the Court to determine which of the two leases, the one claimed by the plaintiff and the one claimed by the defendant, is superior to the other.

Continental Oil Company filed a Motion for Summary Judgment alleging that, first, plaintiff's cause of action was barred by the applicable Statute of Limitations and

by laches; and second, that said cause of action had been adjudicated in favor of the defendant in the two former suits by reason of which the plaintiff is now precluded from recovering in this action.

The trial court granted the defendant's Motion and entered a judgment for the defendant on the 31st day of May, 1951. An appeal was taken to the United States Court of Appeals, Tenth Circuit, and on December 3, 1951, this Court entered the following order:

> "On consideration whereof, it appearing to the Court that every question presented in this cause was decided in our case No. 2422, Ben Preston vs. Kaw Pipe Line Company, et al., reported at 128 F. (2d) 162, and our cause No. 2142, Ben Preston vs. Kaw Pipe Line Company, et al., reported at 113 F. (2d) 311, it is now here ordered, on authority of the above-entitled cases, that the judgment in this cause be and the same is hereby affirmed without written opinion."

Thus, the Circuit Court has now ruled in effect that:

(1) The initial action was barred by the Statute of Limitations and laches and plaintiff was denied the right to amend;

(2) The second action was barred by the adjudication above which is based upon the Statute of Limitations and laches; and

(3) The third action is barred by the two former adjudications.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

(1) The Circuit Court has held that the issues in this case have been formerly adjudicated and has denied the petitioner the right to maintain his action upon this new complaint wherein he has supplied the essential allegations

omitted from the complaint in the first action. This decision is in conflict with decisions of other Circuit Courts and with applicable decisions of this Court on the question of res judicata.

The applicable rule on res judicata is stated in this Court's opinion in *Hughes* v. *U. S.*, 4 Wall 232, 18 L. Ed. 303:

> "In order that a judgment may constitute a bar to another suit, it must be rendered in a proceeding between the same parties or their privies and the point of controversy must be the same in both cases, and it must be determined on its merits. If the first suit was dismissed for a defect of pleading or parties or a misconception of the form of proceeding or want of jurisdiction or was disposed of upon any ground, which did nothing to the merits of the action, the judgment rendered will prove no bar to another suit."

Other Circuit Courts in the cases cited below have held that the sustaining of a demurrer or motion for summary judgment because of a defect in the pleadings or other matters not going to the merits of the case is not a bar to another suit where the defect is supplied. *U. S.* v. *New Amsterdam Casualty Company*, 55 F. 2d 377; *Gilmer* v. *Morris*, 46 Fed. 333; *Hartmann* v. *Time, Inc.*, 166 F. 2d 127.

This subject is also treated in 30 Am. Jur. 944, Sec. 208, Judgments:

> "In stating the doctrine of res judicata, the courts refer to the fact that the judgment sought to be used as a basis of the doctrine was rendered upon the merits, since it is a general rule that a judgment rendered on any grounds which do not involve the merits of the action may not be used as a basis for the operation of the doctrine of res judicata. Under this rule, an adjudication on grounds purely technical, where the merits cannot come into the question, is limited to the point actually decided, and does not preclude the maintenance of a subsequent action

brought in a way to avoid the objection which proved fatal in the first action." *

A judgment sustaining a demurrer to a petition for the reason that it appeared upon the face thereof that the cause of action was barred by the statute of limitations is no bar to a subsequent suit, the petition in which is so drawn as not to raise upon its face the question of the statute of limitations (13 A. L. R. 1117), and the dismissal of a petition on demurrer on the ground of laches will not preclude the maintenance of a subsequent suit in which the delay is satisfactorily explained (13 A. L. R. 1117).

In the case of *Hartman* v. *Time, Inc.*, 166 F. 2d, 127, supra, the plaintiff filed a complaint upon an alleged libel in the District Court of the United States for the Eastern District of Pennsylvania, and the defendant moved for a summary judgment, contending that the issues had been formerly adjudicated in the District of Columbia. In the District of Columbia action the defendant was granted a judgment "on the merits" pursuant to a motion for summary judgment based upon the applicable statute of limitations.

The plaintiff took the case on appeal to the Circuit Court of Appeals, Third Circuit, upon the ground that the lower court had erred in holding the case had been formerly adjudicated. The Circuit Court reversed the lower court and held that in Pennsylvania a plea of res judicata will bar an action when a court of competent jurisdiction has determined a litigated cause upon its merits and not otherwise. The effect of the Circuit Court's decision was that a judgment based upon a statute of limitations is not a judgment on the merits and further that a court may examine the judgment claimed as a bar

* See also *Gould* v. *Railroad Co.*, 91 U. S. 526, 23 L. Ed. 416.

to determine whether or not it was actually rendered on the merits of the case.

However, it is clear that in the present action the Federal Court must follow the law and policy of Kansas with respect to a plea of res judicata. *Angel* v. *Bullington*, 330 U. S. 183, 67 S. Ct. 657; *Hartman* v. *Time, Inc.*, 166 F. 2d 127.

(2) The Circuit Court in the instant case has declined to follow the decisions of the Supreme Court of Kansas bearing upon the doctrine of res judicata in refusing to permit the maintenance of an action designed to remedy the defects of pleading which brought about the dismissal of a prior complaint.

In *McClung* v. *Hohl*, 10 K. A. 93, 61 Pac. 507, 508, the Kansas Court allowed the plaintiff below to file a new complaint after the first case had been dismissed and quoted with approval the following passage from *Gould* v. *Railroad Co.*, 91 U. S. 526, 23 L. Ed. 416, supra:

> "But if the plaintiff fails on demurrer to his first action from the omission of an essential allegation in his declaration, which is supplied in his second suit, the judgment in the first suit is not a bar to the second."

In another Kansas case, *Penquite* v. *General Accident and Life Ins. Co.*, 126 Kan. 511; 268 Pac. 851, the Court said:

> "As to the claim of this appellant that this is res adjudicata, having been fully and completely determined in the former hearing on the demurrer to the petition, we think any substantial addition to the allegations of the petition setting forth facts not theretofore contained in the original petition, or inadvertently omitted therefrom, if it is a material and additional allegation to the issues already involved, will require on the hearing of a demurrer to the amended petition a new and different ruling, and on

> **the trial a new and different judgment, and with such amendment the case is not res adjudicata."**

And so it is apparent that the law on this subject is the same in all quarters. A case must be heard on its merits before a judgment therein will constitute a bar to a subsequent proceeding.

Such a hearing has not been had herein. The initial complaint was dismissed for reasons of laches and limitations, and thereafter plaintiff's repeated attempts to explain his delay in initiating the litigation have been refuted. Each subsequent action instituted by him has succumbed to the defense of res judicata, although containing new and material allegations bearing upon the issues which brought about the dismissal of his original suit. It is inconceivable that the Court could rule upon the sufficiency of these additional allegations by considering the bare pleadings. A hearing on the merits is called for and required by the applicable Kansas decisions.

CONCLUSION

We submit that the trial court committed error in sustaining the Motion for Summary Judgment filed by respondent, and that the Circuit Court of Appeals erred in affirming the decision of the lower court, and in entering judgment in this action on its merits, in favor of the respondent, and against the petitioner.

It is urged that this case is one calling for the exercise by this Honorable Court of its supervisory powers in order that justice may be accorded the petitioner. To that end, a writ of Certiorari should be granted, and this Honorable Court should review the decision and orders of the United States Circuit Court of Appeals, Tenth Circuit, and overrule the decision of said Court in this cause directing that this action be remanded to the United

States District Court for the District of Kansas, First Division, or that the motions for summary judgment filed by the respondent herein be overruled.

Respectfully submitted,

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CONTINENTAL OIL COMPANY,
a corporation,
Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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FACTS

The material facts are not disputed. They are the same facts upon which petitioner relied in two prior suits. In each of such former suits petitioner appealed

from an adverse judgment to the Court of Appeals for the Tenth Circuit. In both instances the Court of Appeals affirmed, and Petitions for Writ of Certiorari were denied by this Court. The oil and gas leases in this suit are the same oil and gas leases which were involved in the two previous suits. The facts in all three suits are the same, and the parties are the same. There is no material difference between the causes of action alleged and relied upon and the prayers for relief in all three suits.

Petitioner's oil and gas lease bears date of June 25, 1921. It was never delivered to petitioner or his assignor, but was placed in escrow for delivery upon the spudding of a test well in the designated area within 90 days (R. 2-3). The required test well was not commenced within the original period. Some of the lessors of other portions of the blocked acreage extended the period for starting the well until September 21, 1924 (R. 12-13). It does not affirmatively appear that the owner of the tract here involved granted such extension. Petitioner asserts that he did; but whether he did or not is not considered material, since such lease expired by its terms June 25, 1926, unless production of oil or gas had been previously obtained thereon (R. 8-9). No such production occurred prior to June 25, 1926, and no oil was produced on the land involved until February 21, 1939 (almost 13 years after the lease on which petitioner relies had expired). Production was then obtained by respondent under its oil and gas lease dated April 9, 1934 (taken almost eight

years after petitioner's lease, if he had one, expired—R. 5-6).

Petitioner brought his first suit in the United States District Court for the District of Kansas December 30, 1938, against 208 defendants, including respondent. Petitioner appealed from a ruling of the trial court against him upon the pleadings to the Court of Appeals for the Tenth Circuit, where the appeal was dismissed "for the reason that the order appealed from is not a final appealable order" [*Preston* v. *Kaw Pipe Line Co. et al.* (C.C.A. 10, June 28, 1940), 113 F. 2d 939]. Upon remand, motions of defendants, including respondent, were sustained on the ground that the cause of action was barred by the statute of limitations and by laches, and judgment was entered for defendants, including respondent. The facts asserted in that case are stated in detail, as well as an outline of the relief there demanded, by the Court of Appeals in its decision affirming the action of the trial court.

Ben Preston v. *Kaw Pipe Line Co. et al.*,
113 F. 2d 311.

As stated by the Court of Appeals in affirming (p. 312):

> "The prayer of the complaint was that plaintiff (Preston) be decreed to be the equitable owner of the oil and gas leases on all the real estate covered thereby; that the defendant owners be required to execute new leases to plaintiff; that the defendants now holding leases on the land be decreed to be trustees for plaintiff; and that the defendants who

have produced oil or gas from any of the premises be required to account to plaintiff for the same."

Petitioner's Application for Writ of Certiorari in this first suit was denied by this Court December 16, 1940.

311 U.S. 712, 85 L. ed. 463.

Petitioner filed his second suit upon the same leases and against this respondent and others in the District Court of Russell County, Kansas, prior to 1942. The same leases were involved. That case was removed to the United States District Court for the District of Kansas, and after the second adverse judgment against petitioner, he again appealed to the Court of Appeals for the Tenth Circuit. The appellate court again affirmed on May 5, 1942, Petition for Rehearing being denied June 22, 1942 *(Preston* v. *Kaw Pipe Line Co. et al.*, 128 F. 2d 162). In comparing the two previous suits the Court of Appeals says in its opinion (p. 164):

"An examination of the former case reveals that that action was identical with this. It was brought upon the same leases, the same escrow agreement, alleging substantially the same grounds for relief. It asked for the same relief that is asked for in this action. It sought an order of the court compelling the land owners to deliver the old leases or to execute new leases; that the producing oil companies, the lessees in the new leases, be compelled to account for the oil taken from the premises; and asked that they be decreed to be trustees for the benefit of appellant."

From an adverse decision on appeal, petitioner applied to this Court for Writ of Certiorari, which was denied October 26, 1942.

317 U.S. 674, 87 L. ed. 541.

The identical leases are involved in the present suit, as well as the escrow agreement. The parties are the same as in the two former suits. There is no difference in any of the facts relied upon by petitioner in any of the three suits. In the present suit (R. 7) petitioner prays:

> "* * * for a declaratory judgment * * * adjudicating and determining which of the two mineral leases, one held by this plaintiff and the other by the defendant, is valid and superior to the other * * * and for an order declaring and adjudging that the claim of this plaintiff in and to the mineral rights in and under the real estate involved in this action is paramount and superior to the claim of the defendant therein. * * *"

CONTENTION OF PETITIONER

Petitioner relies for Writ of Certiorari herein upon his assertion that the Court of Appeals, by its judgment herein dated December 3, 1951 (R. 31), erred in holding that the issues in this case had been previously adjudicated in the two former suits.

ARGUMENT AND AUTHORITIES

This is the third time this petitioner has brought suit on the oil and gas lease and escrow agreement upon which he relies. He filed his first suit December 30, 1938, twelve and one-half years after his lease had expired by its terms. He prayed therein that his lease be sustained as valid and superior to the oil and gas lease under which respondent developed the leased premises and obtained

production in February, 1939. On August 7, 1939, the trial court sustained motions filed by various defendants, including this respondent, to dismiss on the ground that the cause of action was barred by the statutes of limitation and by laches. Petitioner's appeal therefrom was first dismissed by the United States Court of Appeals for the Tenth Circuit on June 28, 1940, "for the reason that the order appealed from is not a final appealable order" (*Preston* v. *Kaw Pipe Line Co. et al.*, 113 F. 2d 930). Thereafter the trial court entered its final judgment and order dismissing petitioner's action with prejudice. On appeal therefrom the Court of Appeals affirmed on August 9, 1940, after denying Petition for Rehearing (*Preston* v. *Kaw Pipe Line Co. et al.*, 113 F. 2d 311). In affirming, the Court of Appeals says as to petitioner's suit (p. 313):

> "A court of equity looks with especial disfavor upon any unnecessary delay in asserting a claim to property that is highly speculative in character. One may not idly sit by for any considerable period of time without asserting his claim to property of a highly speculative nature to await the outcome of the efforts by others to develop and prove the property, and when such efforts are crowned with success, come in and claim the fruits thereof. Such conduct is frowned upon by a court of equity. *Twin-Lick Oil Co.* v. *Marbury*, 91 U.S. 587, 23 L. ed. 328; *Patterson* v. *Hewitt*, 195 U.S. 309, 25 S. Ct. 35, 49 L. ed. 214; *Gildersleeve* v. *New Mexico Mining Co.*, 161 U.S. 573, 16 S. Ct. 663, 40 L. ed. 812; *James* v. *Anderson*, 39 N. M. 535, 51 P. 2d 601; 21 C.J., § 220, p. 225. *Plaintiff's conduct in sitting by for more than fourteen years effectively*

estops him from asserting any claim to this property at this late hour.

"The judgment is affirmed" (Italics ours).

Certiorari was denied by this Court December 16, 1940.

Preston v. *Kaw Pipe Line Co. et al.*,
311 U.S. 712, 85 L. ed. 463.

On June 23, 1941, petitioner filed his second suit upon the same lease and escrow agreement in the District Court of Russell County, Kansas. Upon removal to the United States District Court for the District of Kansas (the same court in which the first suit was filed), respondent and other defendants therein filed Motions for Summary Judgment. One of the grounds for such motions was that the cause of action had been previously adjudicated between the parties by the judgment in the former suit. On August 2, 1941, such motions were sustained. The order thereon recited:

> "And that the plaintiff take nothing by his petition herein as against the above named defendants, and each of them, and that summary judgment be and hereby is rendered and decreed herein in favor of said defendants and against said plaintiff, and that the plaintiff's said petition and this action be and the same hereby are dismissed on the merits and with prejudice to a new action as to each of said above named defendants, and that the said defendants, and each of them, go hence without day."

Petitioner again appealed, asserting the same alleged error he has asserted here, *e.g.*, that where a cause fails

through defect in the pleadings or other than on its merits, such suit is not a bar to a later proceeding. In again affirming (*Preston* v. *Kaw Pipe Line Co. et al.*, 128 F. 2d 162), the United States Court of Appeals on June 22, 1942, after denying Petition for Rehearing, had the following to say of petitioner's suit (pp. 164-165):

> "To escape the effect of *res judicata*, appellant cites a number of authorities which hold that where a demurrer is sustained because of a defect in the pleadings or because of defects going to matters other than the merits, it is not a bar to a subsequent action in which the defect is supplied. But that was not the case in the former trial of this action. The motions to dismiss were not sustained on account of defects in the pleadings, but because appellant had lost the right to maintain the action. In other words, he had no cause of action which he could maintain. He could not amend the petition so as to escape the bar of laches that prevented him from maintaining that action. Furthermore, the court in that case did more than enter an order dismissing the complaint. It entered a judgment against appellant and in favor of the defendants on the merits. The court's action constituted a final adjudication of appellant's rights and is an effective and final bar to any further suit. We know of no case that holds to the contrary.
>
> "Affirmed."

Certiorari was denied by this Court October 26, 1942.

Preston v. *Kaw Pipe Line Co. et al.*,
317 U.S. 674, 37 L. ed. 541.

On February 10, 1951, the present suit was filed in the United States District Court for the District of Kansas (the same trial court in which the first suit was filed and to which the second suit was removed). Herein

petitioner prays for declaratory judgment determining that his lease is superior to the lease of respondent. In his first two suits he similarly prayed that his lease be found to be a valid and subsisting lease, superior to the lease of respondent. There is no difference between the three suits. The parties and the facts relied upon in all three suits are the same. It seems inconceivable that any real question can arise as to the identity of the causes of action pleaded in these three suits. The test of identity is stated in 30 Am. Jur., Judgments, Section 174:

> "In the application of the doctrine of *res judicata*, if it is doubtful whether a second action is for the same cause of action as the first, the test generally applied is to consider the identity of facts essential to their maintenance, or whether the same evidence would sustain both. If the same facts or evidence would sustain both, the two actions are considered the same within the rule that the judgment in the former is a bar to the subsequent action. If, however, the two actions rest upon different states of facts, or if different proofs would be required to sustain the two actions, a judgment in one is no bar to the maintenance of the other. It has been said that this method is the best and most accurate test as to whether a former judgment is a bar in subsequent proceedings between the same parties, and it has been designated as infallible."

Applying these tests, it is certain that the present suit is barred by the two prior judgments, both of which were affirmed on appeal and in both of which this Court denied certiorari. The same alleged facts are pleaded in all three suits, and the same evidence would be required to sustain each of them.

The general rule is aptly stated by the same authority (30 Am. Jur., Judgments, Section 178) as follows:

> "It is a fundamental principle of jurisprudence that material facts or questions which were in issue in a former action, and were there admitted or judicially determined, are conclusively settled by a judgment rendered therein, and that such facts or questions become *res judicata* and may not be litigated in a subsequent action between the same parties or their privies, regardless of the form the issue may take in the subsequent action, whether the subsequent action involves the same or a different form of proceeding, or whether the second action is upon the same or a different cause of action, subject matter, claim, or demand, as the earlier action. In such cases, it is also immaterial that the two actions are based on different grounds, or tried on different theories, or instituted for different purposes, and seek different relief."

The rule so stated is supported by many decisions of this Court, as well as the following from the Supreme Court of Kansas:

> *Hoover* v. *Roberts*, 146 Kan. 785, 74 P. 2d 152, 115 A.L.R. 182;
> *Alexander* v. *Clarkson*, 100 Kan. 394, 164 P. 294;
> *Lyon* v. *Harrison*, 127 Kan. 318, 273 P. 429.

Petitioner attempts to avoid these wholesome rules by his assertion that the former judgments against him were not rendered on the merits. This is the same assertion he made in the appeal of his second prior suit (*Preston* v. *Kaw Pipe Line Co. et al.*, 128 F. 2d 162).

He cites in support of this position 30 Am. Jur., Judgments, Section 208. However, his quotation from that authority stops just short of a very material statement. Immediately following his quotation at Pages 8-9 of his Petition and Brief will appear the following (30 Am. Jur., Judgments, Section 208, p. 945):

> "As to the technical point decided, however, the judgment is conclusive, even though it is not conclusive as to the merits of the entire controversy. *As distinguished from this situation, if the judgment determines that the plaintiff has no cause of action against the defendant, the plaintiff in respect thereto is permanently out of court*" (Italics ours).

On this identical point the Court is asked to compare the finding and order of the United States Court of Appeals in the second appeal previously taken by petitioner (*Preston* v. *Kaw Pipe Line Co. et al.*, 128 F. 2d 164-165), which reads in part as follows:

> "*The motions to dismiss were not sustained on account of defects in the pleadings but because appellant had lost the right to maintain the action. In other words, he had no cause of action which he could maintain.* He could not amend the petition so as to escape the bar of laches that prevented him from maintaining that action. *Furthermore, the court in that case did more than enter an order dismissing the complaint. It entered a judgment against the appellant and in favor of the defendants on the merits.* The court's action constituted a final adjudication of appellant's rights and is an effective and final bar to any further suit. We know of no case that holds to the contrary" (Italics ours).

Thus a judgment *on the merits* in this controversy was entered against petitioner by the United States District Court for the District of Kansas on May 13, 1940. That judgment has been affirmed on appeal and certiorari was denied. Thereafter petitioner's second suit, in which he relied upon the identical assertion he now makes here, was also decided against him. This second judgment was also affirmed on appeal, and certiorari was again denied by this Court. He has already asserted and exhausted the remedy which he here seeks for the second time. The contention he makes here was resolved against him by the judgment of the Court of Appeals on June 22, 1942 (*Preston* v. *Kaw Pipe Line Co. et al.*, 128 F. 2d 162), and this Court has already denied certiorari thereon (*Preston* v. *Kaw Pipe Line Co. et al.*, 317 U.S. 674, 87 L. ed. 541).

CONCLUSION

This Court should deny certiorari because it has already held on October 26, 1942 (*Preston* v. *Kaw Pipe Line Co. et al.*, 317 U.S. 674, 87 L. ed. 541) that certiorari should be and was denied in a suit between the same parties, involving the same facts and the same cause of action, and in which the same grounds were asserted by this petitioner for review.

Respectfully submitted.

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